STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2007
v	No. 266281 Tuscola Circuit Court
DAVID WAYNE BELCHER, Defendant-Appellant.	LC No. 04-009215-FH

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for arson of a dwelling house, MCL 750.72. The trial court sentenced defendant to 6 years and 3 months to 20 years' imprisonment. Because the evidence was legally sufficient to convict defendant of arson of a dwelling house, the trial court did not abuse its discretion in denying defendant's request to sequester witnesses, the prosecutor did not commit misconduct during questioning or closing argument, the trial court did not engage in improper fact finding and properly scored defendant's sentencing guidelines, and finally, defense counsel was not ineffective, we affirm.

On the evening of April 6, 2002, a fire began in an apartment in Caro, Michigan. Chad Brown and Tom Szymanski resided in the apartment. Szymanski and defendant knew each other through mutual friends. On the day of the fire, Szymanski and defendant both attended a barbecue where defendant and Szymanski argued. As the argument escalated, defendant threatened to hurt Szymanski and burn down his house. Immediately thereafter, defendant had a friend drive him to downtown Caro. That same evening, between 7:00 and 7:30 p.m. a neighbor saw Szymanski's apartment door on fire.

Sergeant Gregory Proudfoot, an expert in the origin and causation of fires, investigated the fire in question. According to his testimony, the burn patterns beside the doorway, and on the door itself, indicated that someone used an ignitable liquid to accelerate the fire. The evidence further revealed that someone entered the apartment by force. Sergeant Proudfoot ultimately concluded that the fire originated in the carpeting on both sides of the apartment door and that it was caused by a deliberate act of arson.

Defendant's friends, Russell Powell and Tiffany McTaggart, testified that, in April 2004, defendant told them that he burned down an apartment in Caro. At trial, McTaggart testified that

only she, Powell, and their friend, Keva Mahotna, were present for defendant's confession. But, she also admitted at trial that she had previously testified at defendant's preliminary examination that two additional friends, Josh Gillespie and Scott Johnson, were also present for the confession.

Defendant testified that after his friend dropped him off in Caro on the night of the fire he visited the home of Martha Scott. Scott's house was located 1 to 1.5 miles from Szymanski's apartment. Scott recalled defendant arriving at her house between 7:30 and 8:00 p.m. on the night of the fire. When he arrived, defendant told Scott that he was in a fight earlier that day and that he jokingly threatened to burn the person's house down.

On appeal, defendant first argues that the evidence presented at trial was insufficient to establish his identity as the arsonist. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). To establish arson of a dwelling house, under MCL 750.72, the prosecution must show that defendant willfully or maliciously burned a dwelling house. *People v Barber*, 255 Mich App 288, 294; 659 NW2d 674 (2003). Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Additionally, arson is often proven through circumstantial evidence. *People v Nowack*, 462 Mich 392, 402-403; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The jury heard testimony that defendant fought with Szymanski and threatened to burn his house down on the day of the fire. Evidence that defendant threatened to start the fire was certainly relevant to establishing his identity as the arsonist. See *People v Chism*, 390 Mich 104, 146; 211 NW2d 193 (1973). Also, a rational juror could have inferred that defendant had the opportunity to start the fire from the evidence presented. Defendant admitted he knew where Szymanski lived and he asked his friend to drop him off less than one block from Szymanski's apartment on the night of the fire. Furthermore, Brown left the apartment at 7:10 p.m., the fire department was called to the scene at 7:30 p.m., and defendant arrived at Scott's house between 7:30 and 8:00 p.m. Although mere presence at the scene of the crime, at the time the crime occurred, is insufficient to establish commission of the crime, evidence of opportunity and presence at the crime scene may contribute to a finding of guilt. *People v Barrera*, 451 Mich 261, 295; 547 NW2d 280 (1996); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The prosecution also presented evidence that defendant essentially admitted to committing the instant offense to witnesses Powell and McTaggart. Defendant argues that the testimony of Powell and McTaggart lacked credibility because it conflicted with his own testimony. Defendant specifically asserts that Powell is a convicted felon and was drunk at the time he heard defendant's alleged admission, and McTaggart changed her testimony after the preliminary examination. But, it is a well-settled principle that "in reviewing a sufficiency argument, this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Therefore, we will not second-guess Powell and McTaggart's credibility. The

circumstantial evidence presented at trial is more than sufficient to establish defendant's identity as the arsonist.

Defendant next argues on appeal that the trial court abused its discretion when it denied his request to sequester Powell and McTaggart. In general, reasonable requests to sequester witnesses should be granted. *People v Hayden*, 125 Mich App 650, 659; 337 NW2d 258 (1983). But, the decision whether to sequester witnesses is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id.* Under MCL 600.1420, "a trial court may, for good cause shown, exclude witnesses from the courtroom when they are not testifying." *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). MRE 615 further provides that a trial court may order witnesses excluded so that they cannot hear the testimony of other witnesses. *Id.*

Our review of the record reveals that defendant did not timely request sequestration. While there is no official timing requirement for motions to sequester, it is certainly preferable to make such a motion at the beginning of the trial when the sequestration order can be properly and reasonably enforced. Defendant moved to sequester the witnesses on the second day of the trial, after 14 witnesses had already testified. Moreover, while we recognize that "one of the purposes of the sequestration of a witness is to prevent him from 'coloring' his testimony to conform with the testimony of another," *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976), it is uncertain whether McTaggart tailored her testimony to Powell's. And, regardless, considering that McTaggart's testimony was not the only evidence of defendant's guilt, defendant cannot establish that the denial of his motion to sequester was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The trial court's decision to deny the late sequestration motion does not require reversal.

Defendant next argues on appeal that the prosecutor committed misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where a curative instruction could have alleviated any prejudicial effect reversal is not warranted. *Id.* at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The test for prosecutorial misconduct is whether the prosecutor's statements denied defendant a fair trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant argues that the prosecutor improperly appealed to the jury's sympathies by asking Szymanski about the personal possessions he lost in the fire and whether he had renter's insurance. While the prosecutor's line of questioning may have placed Szymanski in a sympathetic light, the questions did not blatantly appeal to the jury's sympathies and they were properly responsive to defendant's argument that Brown or Szymanski may have started the fire. By establishing that both Brown and Szymanski lost personal possessions in the fire and that they did not have renter's insurance, the prosecutor properly rebutted the suggestion that they had any involvement with the fire. Furthermore, on cross-examination, defense counsel

questioned Szymanski about the personal possessions he stored in the apartment. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (a party cannot obtain relief on appeal for an alleged error at trial to which the complaining party contributed by plan or negligence). In any event, the trial court cured any potential for error by instructing the jury that it should not let sympathy or prejudice influence its decision. Defendant has failed to establish that the prosecutor's questions affected the outcome of the trial. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586.

Defendant further argues that the prosecutor improperly denigrated him and his defense counsel by calling a defense argument a "red herring." During his closing argument, defense counsel argued that Brown or Szymanski may have started the fire. On rebuttal, the prosecutor claimed the argument was a "red herring." A prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury. *Watson*, *supra* at 592. If a comment is directly responsive to a particular defense argument, however, it is not improper. *Id*. at 593. Here, the comment was properly responsive to defense counsel's suggestion that someone other than defendant intentionally started the fire. Moreover, the trial court alleviated any potential for error by instructing the jury that it should decide the import of the evidence presented and that attorneys' arguments are not evidence. Therefore, defendant cannot establish that the prosecutor's remark affected the outcome of the case. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586. Reversal is not warranted.

Defendant next argues on appeal that he is entitled to resentencing because the trial court engaged in impermissible judicial fact-finding and because his sentencing guidelines were improperly scored. The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). If the minimum sentence imposed falls within the recommended minimum sentence range under the legislative guidelines, we must affirm, absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *Babcock*, *supra* at 261. The trial court's factual findings at sentencing are reviewed for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Defendant initially argues that his sentence was invalid because the trial court engaged in impermissible judicial fact-finding. Specifically, defendant claims that under *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005), any findings of fact supporting a sentence imposed by a trial court must be proven beyond a reasonable doubt before a jury. However, Michigan's indeterminate sentencing system is not subject to the requirements imposed by *Apprendi*, *Blakely*, and *Booker*. *People v Drohan*, 475 Mich 140, 159-161; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant further argues that the trial court incorrectly scored Offense Variable (OV) 2, MCL 777.32, OV 9, MCL 777.39, OV 13, MCL 777.43, and OV 17, MCL 777.47. OV 2 assesses the lethal potential of weapons possessed or used by the offender, and 15 points are scored for the possession or use of an incendiary device. MCL 777.32(1)(b). At trial, an expert

in the origin and causation of fires testified that the burn patterns near the apartment door indicated that the arsonist used an ignitable liquid to accelerate the fire. In light of this evidence, the trial court did not clearly err when it found that defendant used an incendiary device in perpetrating the offense. The trial court properly assessed defendant 15 points.

OV 9 takes into account the number of victims of a crime and may be scored at ten points if there were two to nine victims. MCL 777.39(1)(c). When scoring OV 9, the trial court must "(c)ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Melton*, 271 Mich App 590, 595; 722 NW2d 698 (2006). Defendant argues that OV 9 should be zero because only one person was in the building at the time of the fire. However, the prosecutor presented evidence that at least one police officer and three firemen entered the building before the fire was extinguished. Persons who intervene after the fact may be considered victims. See, e.g., *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004); *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002); *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988). There was no scoring error regarding OV 9.

OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43. Ten points are scored for OV 13 if "the offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(1)(c). MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted." The trial court assessed ten points because defendant was convicted of two felonies *after* he committed the instant offense. Defendant argues that only felonies committed *before* the date of the offense should be counted. The plain language of the statute does not preclude consideration of the five-year period immediately after the sentencing offense, see *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003), and our Supreme Court has held that any "crimes committed during *a* five-year period that *encompasses* the sentencing offense can be considered." *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006) (emphasis added). It is crucial that the sentencing offense be "part of a *pattern* of felonious criminal activity." MCL 777.43; *Id*. at 86-87. Considering that defendant committed two felonies within five years of setting the fire, the trial court did not err in including the instant offense in a pattern of three crimes.

Defendant also claims that OV 17 was improperly scored at ten points pursuant to MCL 777.47(1)(a) and MCL 777.22(1). When defendant moved for resentencing, the trial court properly ordered that OV 17 be rescored at zero. But, as the trial court noted, rescoring OV 17 did not change the applicable sentencing range, and the trial court did not resentence defendant. Based on the record, resentencing is not required based on OV 17 alone. See *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Defendant finally argues that he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to the existing record. See *Rodriguez*, *supra* at 38. To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance

of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defendant argues that his trial counsel rendered ineffective assistance of counsel by failing to object to the improper scoring of the sentencing guidelines. But, the record shows that defense counsel did, in fact, object to the scoring of OV 9, OV 13, and OV 17. Thus, his conduct with regard to those offense variables was not deficient. Furthermore, there was no scoring error with regard to OV 2. Therefore, defense counsel cannot be deemed ineffective for failing to object to the scoring of OV 2. See *People v McGhee*, 268 Mich App 600, 627; 709 NW2d 595 (2005) (counsel is not required to make futile objections).

Defendant further argues that defense counsel was ineffective for failing to object to the prosecutor's misconduct. But, because the prosecutor did not engage in misconduct, defense counsel cannot be deemed ineffective for failing to object to the challenged remarks. See *McGhee, supra*. Moreover, in light of the trial court's instructions to the jury, defendant cannot establish that defense counsel's failure to object was outcome determinative. *Henry, supra* at 146. Defendant has failed to overcome the presumption of effective assistance of counsel. *Id*.

Defendant also alleges that he was prejudiced by defense counsel's failure "to object to most of the issues raised in the brief." However, defendant failed to support this claim either factually or legally. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto